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## Unlimited Data?: Placing Limits on Searching Cell Phone Data Incident to a Lawful Arrest

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# UNLIMITED DATA?: PLACING LIMITS ON SEARCHING CELL PHONE DATA INCIDENT TO A LAWFUL ARREST

Thomas Rosso\*

*The “search incident to arrest exception” is one of several exceptions to the general requirement that police must obtain a warrant supported by probable cause before conducting a search. Under the exception, an officer may lawfully search an arrestee’s person and the area within the arrestee’s immediate control without a warrant or probable cause, so long as the search is conducted contemporaneously with the lawful arrest. The U.S. Supreme Court has justified the exception based on the need for officers to discover and remove any weapons or destructible evidence that may be within the arrestee’s reach. Additionally, the Court has held that, under the exception, police may search any containers found on the arrestee’s person without examining the likelihood of uncovering weapons or evidence related to the arrestee’s offense. In light of these principles, should the exception permit officers to search the data of a cell phone found on an arrestee’s person?*

*In January 2014, the Supreme Court granted certiorari to review two appellate rulings and resolve a split among the circuits and state courts on this question. This Note examines three approaches courts have taken to resolve the issue: a broad approach, a middle approach, and a narrow approach. This Note argues that the Supreme Court should adopt the narrow approach and prohibit warrantless searches of cell phone data under the exception.*

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## INTRODUCTION

Imagine Willie Robinson is driving through a residential neighborhood in Washington, D.C.<sup>1</sup> A police officer in the neighborhood has reason to believe that Mr. Robinson is driving on a revoked license, which is an arrestable offense in the District of Columbia. The officer pulls Mr. Robinson over and, after confirming that he does not have a valid driver's license, places him under arrest. In accordance with local police procedures, the officer begins to search Mr. Robinson. During the search, the officer feels a rectangular item in Mr. Robinson's front shirt pocket. He removes it and sees that it is an iPhone. After handcuffing Mr. Robinson, the officer unlocks the phone and begins to scroll through Mr. Robinson's recent messages. After reading through several of Mr. Robinson's emails and text messages, he finds a text message from a known drug dealer using a slang term for heroin. This text message is later used as evidence against Mr. Robinson in a conviction for conspiracy to distribute heroin.

This hypothetical is adapted from a U.S. Supreme Court case decided in 1973,<sup>2</sup> which was obviously long before individuals carried sophisticated electronic devices such as iPhones. In that case, the item that the officer found in Mr. Robinson's pocket was a cigarette pack rather than an iPhone.<sup>3</sup> The officer opened the pack and inside found several heroin capsules.<sup>4</sup> The Supreme Court held that the search was lawful under the "search incident to arrest exception," which is one of several exceptions to the general requirement that a search may only be conducted pursuant to a warrant supported by probable cause.<sup>5</sup>

Under the exception, police may lawfully search an arrestee's person and the area within the arrestee's immediate control without a warrant or probable cause for the search, so long as the search is conducted contemporaneously with the lawful arrest.<sup>6</sup> The exception has been justified by the need for officers to search for and remove any weapons or destructible evidence that may be within the defendant's reach.<sup>7</sup> *United States v. Robinson* established that a lawful arrest authorizes police officers to conduct this type of warrantless search without examining in each case the likelihood of uncovering weapons or evidence related to the crime of arrest.<sup>8</sup> The case also established that police may search the contents of any "containers" found on the arrestee's person during such a search.<sup>9</sup> As noted above, in *Robinson*, the "container" was a cigarette pack,<sup>10</sup> but courts

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1. See generally *United States v. Robinson*, 414 U.S. 218 (1973) (discussing an analogous factual scenario).

2. See *id.* at 218.

3. *Id.* at 223.

4. *Id.*

5. See *Katz v. United States*, 389 U.S. 347, 356–57 (1967).

6. *Robinson*, 414 U.S. at 235–36; see also *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (establishing the scope of the search incident to arrest exception).

7. See *Chimel*, 395 U.S. at 762–63.

8. *Robinson*, 414 U.S. at 235.

9. *Id.* at 236.

10. *Id.* at 223.

following *Robinson* have also held that searches of wallets<sup>11</sup> and address books<sup>12</sup> are lawful under the search incident to arrest exception.

Courts have struggled to determine whether the *Robinson* rule allows police officers to search data on a cell phone found on an arrestee's person during a search incident to an arrest.<sup>13</sup> Some have held that a cell phone is essentially a "container" of information and may be lawfully searched just like a cigarette pack, wallet, or address book.<sup>14</sup> These courts have stated that the heightened privacy interest an arrestee may have in his cell phone should not control the lawfulness of a search of its contents.<sup>15</sup> Moreover, courts have reasoned that the interest in establishing bright-line rules to guide on-the-spot police judgments supports applying *Robinson* to cell phone searches.<sup>16</sup> Otherwise, both police officers and courts would arguably face difficult line-drawing problems, requiring *post hoc* determinations, which the Supreme Court has sought to avoid.<sup>17</sup>

However, other courts have held that a cell phone is distinguishable from a physical container, and therefore the generalization created by the *Robinson* rule should not govern cell phone searches.<sup>18</sup> These courts have noted that information stored on cell phones is, "by and large, of a highly personal nature," including "photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records."<sup>19</sup> Moreover, a modern cell phone may carry the equivalent of millions of pages of text.<sup>20</sup> Therefore, it is argued that a modern cell phone contains the volume and substance of information that "one would

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11. See *infra* note 100.

12. See *infra* note 101.

13. See *United States v. Wurie*, 728 F.3d 1, 5 (1st Cir. 2013), *cert. granted*, 134 S.Ct. 999 (2014) ("Courts have struggled to apply the Supreme Court's search-incident-to-arrest jurisprudence to the search of data on a cell phone seized from the person.").

14. See, e.g., *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007); *People v. Diaz*, 244 P.3d 501, 509 (Cal. 2011); *Hawkins v. State*, 723 S.E.2d 924, 926 (Ga. 2012).

15. See *Diaz*, 244 P.3d at 508 ("[T]he lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have' in property immediately associated with his or her person at the time of arrest, even if there is no reason to believe the property contains weapons or evidence." (quoting *New York v. Belton*, 453 U.S. 454, 461 (1981))); *Hawkins*, 723 S.E.2d at 926 ("[T]he mere fact that there is a potentially high volume of information stored in the cell phone should not control the question of whether that electronic container may be searched.").

16. See, e.g., *Diaz*, 244 P.3d at 508.

17. See *id.* at 508–09 (citing *Thornton v. United States*, 541 U.S. 615, 623 (2004)).

18. See, e.g., *Wurie*, 728 F.3d at 8–9; *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009).

19. *Wurie*, 728 F.3d at 8; see also *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013) (distinguishing *Robinson* based on the "very personal and vast nature of the information" stored on modern cell phones); *Smith*, 920 N.E.2d at 954 ("Even the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container.").

20. See *Wurie*, 728 F.3d at 8 (citing Charles E. MacLean, *But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. COURTS L. REV. 37, 42 (2012)) (noting that an Apple iPhone 5 model comes with sixty-four gigabytes of storage, which is enough to store 4 million pages of text).

previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest."<sup>21</sup> This arguably establishes a heightened expectation of privacy in cell phones compared to other containers, warranting a different set of rules to govern cell phone searches.<sup>22</sup>

Some courts have concluded that the rationales justifying the search incident to arrest exception simply do not apply to cell phone searches, and therefore the exception does not permit warrantless searches of cell phone data.<sup>23</sup> These courts have reasoned that cell phones are not dangerous to arresting officers and that the risk of evidence being lost or destroyed is eliminated once the cell phone is seized from the arrestee.<sup>24</sup>

Other courts have concluded that searching a cell phone incident to an arrest should be limited under the exception but not eliminated.<sup>25</sup> These courts have held that searching a cell phone seized from an arrestee's person should be permitted only when it is reasonable to believe that evidence relevant to the crime of arrest might be found on the device.<sup>26</sup> Although this approach has not been applied above the trial-court level, several commentators have advocated for this approach.<sup>27</sup> They argue that the approach is supported by the Supreme Court's decision in *Arizona v. Gant*,<sup>28</sup> which permits vehicle searches incident to an arrest where it is reasonable to believe evidence related to the crime of arrest might be found in the vehicle.<sup>29</sup> However, in *Gant*, the Court explicitly limited its holding to the vehicle search context, so it is not clear that the Court would be willing to extend its decision to cell phone searches.<sup>30</sup>

In January 2014, the Court granted certiorari to review two appellate rulings on this issue.<sup>31</sup> The Court's decision will have a substantial impact on privacy rights. Law enforcement agencies executed an estimated 12,196,959 arrests in 2012.<sup>32</sup> Meanwhile, the rate of cell phone ownership

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21. *Id.* at 8.

22. *See id.* at 8–9.

23. *See infra* Part II.C.

24. *See infra* Part II.C.

25. *See infra* Part II.B.

26. *See infra* Part II.B.

27. *See infra* Part II.B.

28. 556 U.S. 332 (2009).

29. *Id.* at 343.

30. *See id.*

31. *See* *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), *cert. granted*, 134 S.Ct. 999 (2014); *Riley v. California*, No. D059840, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013), *cert. granted*, 134 S.Ct. 999 (2014). Oral argument is scheduled for April 29, 2014. *See Supreme Court of the United States October Term 2013: For the Session Beginning April 21, 2014*, SUPREME CT. U.S. (Feb. 11, 2014), [http://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalApr2014.pdf](http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApr2014.pdf).

32. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012, at 1 (2013), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf>.

in the United States has grown substantially in recent years.<sup>33</sup> As of May 2013, 91 percent of surveyed American adults reported owning a cell phone, compared with 66 percent in January 2005.<sup>34</sup> Additionally, a rapidly growing percentage of Americans own smartphones, which can carry far more information and have many more uses than traditional phones.<sup>35</sup> Fifty-five percent of surveyed Americans reported that their cell phone is a smartphone in June 2013, up from 33 percent in May 2011.<sup>36</sup> This suggests that if police are automatically permitted to search the data of an arrestee's cell phone incident to an arrest, several million such searches could occur yearly in the United States.

Part I of this Note examines the history of the search incident to arrest exception, focusing particularly on the Supreme Court's search for bright-line rules regarding the scope of the exception. Part II introduces three approaches to applying the doctrine to cell phone searches: a broad approach, a middle approach, and a narrow approach. Part III argues that courts should adopt the narrow approach and prohibit warrantless searches of cell phone data under the search incident to arrest exception.

#### I. THE EVOLUTION AND CURRENT STATE OF THE SEARCH INCIDENT TO ARREST EXCEPTION

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>37</sup> The Amendment was adopted largely in response to British abuses of the warrant system during the Colonial Era.<sup>38</sup> The Supreme Court has held that, under the Amendment, warrantless searches are "*per se* unreasonable," and are therefore prohibited, "subject only to a few specifically established and well-delineated exceptions."<sup>39</sup> Commentators have noted that, notwithstanding this assertion, the exceptions to the warrant requirement

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33. See PEW RESEARCH CTR., SMARTPHONE OWNERSHIP—2013 UPDATE, at 8 (2013), available at [http://pewinternet.org/~media/Files/Reports/2013/PIP\\_Smartphone\\_adoption\\_2013\\_PDF.pdf](http://pewinternet.org/~media/Files/Reports/2013/PIP_Smartphone_adoption_2013_PDF.pdf).

34. *Id.* at 8–9.

35. See PEW RESEARCH CTR., CELL PHONE ACTIVITIES 2 (2012), available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_CellActivities\\_11.25.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_CellActivities_11.25.pdf); PEW RESEARCH CTR., *supra* note 33, at 2.

36. PEW RESEARCH CTR., *supra* note 33, at 2.

37. U.S. CONST. amend. IV.

38. See THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 23–40 (2008) (discussing how American colonial opposition to general warrants and writs of assistance spurred the adoption of search and seizure protections in state constitutions and, ultimately, contributed to the creation of Fourth Amendment); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a), at 3–8 (5th ed. 2012).

39. *Katz v. United States*, 389 U.S. 347, 357 (1967).

are in fact “neither few nor well-delineated.”<sup>40</sup> Rather, the warrant “requirement” may be thought of as a strong preference, subject to many broad exceptions.<sup>41</sup>

This Part discusses the establishment, refinement, and application of the search incident to arrest exception to the warrant requirement. Part I.A discusses the development of the exception from its inception through *Chimel v. California*,<sup>42</sup> which articulated the modern rationales for the exception. Part I.B discusses the Supreme Court’s search for bright-line rules regarding the scope of the exception.

#### A. Origins of the Exception and the Pre-Chimel Era

The Supreme Court first acknowledged the search incident to arrest exception in dictum of *Weeks v. United States*<sup>43</sup> in 1914. The Court noted the government’s right, “always recognized under English and American law,” and “uniformly maintained,” to “search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.”<sup>44</sup>

Following *Weeks*, the Court vacillated between broad and narrow interpretations of the exception for over fifty years.<sup>45</sup> *Weeks* acknowledged only the right to search an arrestee’s person.<sup>46</sup> However, in 1927, the Court held that police could also search “the place” of arrest, which encompassed “all parts of the premises used for [an] unlawful purpose.”<sup>47</sup> This broad rule, however, was short-lived. In *Go-Bart Importing Co. v. United States*,<sup>48</sup> the Court invalidated a search of an office in which the defendant was arrested.<sup>49</sup> Similarly, in *United States v. Lefkowitz*,<sup>50</sup> the Court held

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40. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985) (noting that there are over twenty exceptions to the warrant requirement); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 770–71 (1994) (“[I]t makes no sense to say that all warrantless searches and seizures are per se unreasonable.”); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 481 (1991) (asserting that the per se unreasonableness of warrantless searches should be replaced with a less rigid but more consistently enforced standard).

41. See 2 LAFAVE, *supra* note 38, § 4.1(a), at 560.

42. 395 U.S. 752 (1969).

43. 232 U.S. 383, 392 (1914) (dictum).

44. *Id.*

45. See *Chimel*, 395 U.S. at 755 (noting that the Supreme Court’s decisions on the issue “have been far from consistent, as even the most cursory review makes evident”); James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1421–25.

46. *Weeks*, 232 U.S. at 392.

47. *Marron v. United States*, 275 U.S. 192, 199 (1927).

48. 282 U.S. 344 (1931).

49. See *id.* at 349–50, 358. The Court noted that in *Marron*, the officers had not conducted a “general search or rummaging of the place,” whereas in *Go-Bart* the officers “made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office.” *Id.* at 358. Additionally, the Court recognized that in *Marron*, the arrestee was engaged in committing an offense at the time of his arrest and the seized items were plainly visible to the officers and were “in the offender’s immediate custody,” which was not the case in *Go-Bart*. *Id.*



that an "exploratory and general" evidence-gathering search of a single room was unlawful.<sup>51</sup>

After approximately fifteen years of contraction,<sup>52</sup> the Court again upheld a broader search in *Harris v. United States*,<sup>53</sup> which involved the search of an arrestee's four-room apartment following his arrest for fraud related to military draft cards.<sup>54</sup> The Court held that searches incident to an arrest "may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control."<sup>55</sup> The Court concluded that the search was reasonable because it was "specifically directed to the means and instrumentalities of the charged crime," which were likely to be concealed and could have been anywhere in the apartment.<sup>56</sup>

The Supreme Court briefly retreated from *Harris*,<sup>57</sup> but shortly thereafter upheld another broad, thorough search in *United States v. Rabinowitz*.<sup>58</sup> Over Justice Frankfurter's forceful dissent,<sup>59</sup> the *Rabinowitz* Court upheld a ninety-minute search of the office in which the defendant was arrested.<sup>60</sup> For nineteen years, *Rabinowitz* stood for the proposition that a "warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested."<sup>61</sup> However, as one commentator has noted, a thorough analysis of the Court's decisions during that period suggests a gradual erosion of this right, foreshadowing the Court's overruling of *Rabinowitz* in *Chimel*.<sup>62</sup>

In *Chimel*, officers arrested the defendant in his home for burglary of a coin shop.<sup>63</sup> The officers then conducted a search of the defendant's three-bedroom home, including his attic, garage, and small workshop that lasted between forty-five minutes and an hour.<sup>64</sup> The search uncovered several items tying the defendant to the burglary.<sup>65</sup> Relying on *Rabinowitz*, the California trial and appellate courts held that the search was lawful.<sup>66</sup> The

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50. 285 U.S. 452 (1932).

51. *Id.* at 465–67.

52. *See* Tomkovicz, *supra* note 45, at 1424.

53. 331 U.S. 145 (1947), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

54. *See id.* at 146–47, 155.

55. *Id.* at 151.

56. *Id.* at 152–53 ("[T]he area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.").

57. *See* *Trupiano v. United States*, 334 U.S. 699, 708 (1948) (holding that a search incident to arrest is a "strictly limited right" that must be justified by "something more in the way of necessity than merely a lawful arrest"), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56 (1950), *overruled by* *Chimel*, 395 U.S. 752.

58. 339 U.S. 56.

59. *Id.* at 68 (Frankfurter, J., dissenting).

60. *See id.* at 58–59, 66 (majority opinion).

61. *Chimel*, 395 U.S. at 760.

62. *See* Tomkovicz, *supra* note 45, at 1425–26.

63. *Chimel*, 395 U.S. at 753.

64. *Id.* at 754.

65. *Id.*

66. *Id.*

U.S. Supreme Court reversed, overruling *Rabinowitz* and holding that the search did not fall within the proper scope of the search incident to arrest exception.<sup>67</sup>

The Court supported its departure from *Rabinowitz*'s broader holding on two grounds. First, the Court held that *Rabinowitz* was "hardly founded on an unimpeachable line of authority," noting that the *Rabinowitz* Court disregarded the narrower approaches taken in *Go-Bart*, *Lefkowitz*, and *Trupiano v. United States* and elevated mere dictum in *Weeks* far beyond its original authority.<sup>68</sup> Second, the Court stated that broad authority to search an arrestee's home following an arrest contradicted the "background and purpose" of the Fourth Amendment, which was adopted in response to extensive home searches conducted under general warrants during the colonial era.<sup>69</sup>

The Court held that a search incident to arrest may only extend to the arrestee's person and the area within the arrestee's immediate control.<sup>70</sup> The Court described two rationales justifying a search limited to this scope.<sup>71</sup> First, the Court held that it is reasonable for an officer to search the arrestee's person and immediate surrounding area to remove weapons the arrestee might use to resist or escape the arrest.<sup>72</sup> "Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated."<sup>73</sup> Second, the Court held that it is reasonable to search the arrestee's person and area within his immediate control to prevent the arrestee from destroying or concealing evidence.<sup>74</sup> The Court concluded that a search beyond this scope would not be justified by the rationales for the exception.<sup>75</sup>

### *B. Searching for a Bright-Line Rule*

Although *Chimel* articulated the scope and rationales of the search incident to arrest exception, the Court did not address whether a search is lawful only when the rationales for the exception support a particular search, or whether instead the right to search follows automatically from the arrest without a case-by-case inquiry into the search's justifications. This section analyzes that issue in two parts. First, it discusses whether a court must examine if a particular search could reasonably have uncovered a weapon or evidence related to the crime of arrest. Next, it examines whether a court must assess the arrestee's ability to have gained access to the searched area.

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67. *Id.* at 768.

68. *Id.* at 760.

69. *Id.* at 760–61.

70. *Id.* at 768.

71. *Id.* at 762–63.

72. *Id.*

73. *Id.* at 763.

74. *Id.*

75. *Id.*

1. The Court Rejects a Case-By-Case Inquiry into  
Whether a Search Could Reasonably Have Uncovered  
Weapons or Evidence Related to the Crime of Arrest

After *Chimel*, lower courts were frequently forced to determine whether the right to search follows automatically from the arrest or must instead be supported by facts indicating some likelihood that either evidence or weapons will be found during the particular search.<sup>76</sup> This issue arose most commonly “in the context of an arrest for a minor traffic violation or some other lesser offense for which there could be no evidence and which would not of itself suggest that the perpetrator would be armed.”<sup>77</sup>

In *Robinson*, the Supreme Court resolved the issue by articulating a bright-line rule that a lawful arrest automatically provides the right to search the arrestee, including any containers<sup>78</sup> found on his person, without considering the likelihood that weapons or evidence would be found during the particular search.<sup>79</sup>

The defendant was pulled over and subsequently arrested for driving with a revoked license.<sup>80</sup> During a search incident to the arrest, the arresting officer felt an item in the defendant’s shirt pocket.<sup>81</sup> The officer removed the object, saw that it was a cigarette pack, opened the pack, and inside found several heroin capsules.<sup>82</sup> The officer later testified that he did not have any particular purpose in mind when he searched the defendant.<sup>83</sup>

The Supreme Court held that the permissible scope of the search was not affected by the seriousness of the initial offense or likelihood of discovering evidence related to that crime during the search.<sup>84</sup> The Court articulated two reasons for this conclusion. First, it rejected the assumption that individuals arrested for driving with a revoked license are less likely to possess dangerous weapons than individuals arrested for other crimes.<sup>85</sup> Second, the Court fundamentally disagreed with the lower court’s suggestion that it must be litigated in each case whether a search was necessary to preserve officer safety or prevent destruction of evidence

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76. See 3 LAFAVE, *supra* note 38, § 5.2, at 128.

77. *Id.*

78. The Supreme Court has defined the term container as “any object capable of holding another object,” which means common “containers” such as a suitcase, backpack, or a purse qualify as containers, but less obvious items, such as a jacket pocket or a car, are also “containers.” See Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1414 (2010) (quoting *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981)).

79. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

80. *Id.* at 220.

81. *Id.* at 222–23.

82. *Id.* at 223.

83. *United States v. Robinson*, 471 F.2d 1082, 1089 (D.C. Cir. 1972), *rev’d*, 414 U.S. 218. The officer also testified: “I just searched him. I didn’t think about what I was looking for. I just searched him.” *Id.*

84. *Robinson*, 414 U.S. at 234–35.

85. *Id.* at 234.

related to the crime of arrest.<sup>86</sup> The Court held that while the search incident to arrest exception is justified by “the need to disarm and to discover evidence,” the authority to search “does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.”<sup>87</sup>

The Court reasoned that an “officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.”<sup>88</sup> Rather, the Court held that the lawful arrest based on probable cause is itself sufficient to establish the authority to search, and therefore “a search incident to the arrest requires no additional justification.”<sup>89</sup>

Justice Marshall dissented, joined by Justices Douglas and Brennan.<sup>90</sup> The dissenters criticized the majority for departing from the Court’s “long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment.”<sup>91</sup> They noted that “[t]he constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case” and contended that this “intensive, at times painstaking” inquiry reflects the Court’s “jealous regard for maintaining the integrity of individual rights.”<sup>92</sup>

Several prominent commentators have suggested, however, that the majority’s decision to forego a case-by-case inquiry has merit.<sup>93</sup> A search incident to arrest is the most common type of law enforcement search and occurs in an extremely wide variety of circumstances, which would arguably make difficult a detailed factual inquiry into the potential for discovering evidence or weapons in each case.<sup>94</sup> An arrest is also a serious and lengthy event that leaves the officer vulnerable to attack, so items that may not generally be dangerous could be used against the officer during an arrest.<sup>95</sup> Moreover, the decision to search must be made with less forethought than most other searches, because arrests are frequently unanticipated, and a search incident to arrest must be executed quickly if it is to successfully prevent the destruction of evidence and preserve officer safety.<sup>96</sup> Thus, one prominent commentator argues,

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86. *Id.* at 235.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 238 (Marshall, J., dissenting).

91. *Id.* at 239.

92. *Id.* at 238 (citations omitted).

93. See 3 LAFAVE, *supra* note 38, § 5.2(c), at 141; WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.5(b), at 206 (5th ed. 2009).

94. See LAFAVE ET AL., *supra* note 93, § 3.5(b), at 206.

95. See *Robinson*, 414 U.S. at 254 (Marshall, J., dissenting).

96. See LAFAVE ET AL., *supra* note 93, § 3.5(b), at 206.

A highly sophisticated set of rules, qualified by all sorts of ifs, ands and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be “literally impossible of application by the officer in the field.”<sup>97</sup>

Moreover, this type of detailed analysis is arguably unnecessary because the fact of an arrest based on probable cause is by itself sufficient to justify the search, which is theoretically a less significant deprivation of liberty than the arrest itself.<sup>98</sup>

Whether well reasoned or not, *Robinson* has had a substantial impact on the scope of the search incident to arrest exception.<sup>99</sup> Under *Robinson*, courts have allowed searches of many different types of “containers” found on an arrestee’s person, including those containing written information, such as wallets<sup>100</sup> and address books,<sup>101</sup> without assessing the likelihood the searched container could contain evidence or weapons.<sup>102</sup>

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97. See 3 LAFAVE, *supra* note 38, § 5.2(c), at 140 (quoting *United States v. Robinson*, 471 F.2d 1082, 1089 (D.C. Cir. 1972) (Wilkey, J., dissenting), *rev’d*, 414 U.S. 218). Professor LaFave argues that the Fourth Amendment can only truly protect individual liberties if police are acting under rules that they can consistently apply correctly; otherwise, motions to suppress evidence may be granted, but the underlying intrusions will not abate. See *id.* § 5.2(c), at 140–41.

98. See LAFAVE ET AL., *supra* note 93, § 3.5(b), at 206.

99. See 3 LAFAVE, *supra* note 38, § 5.2(c), at 144–45.

100. See *United States v. Molinaro*, 877 F.2d 1341, 1346 (7th Cir. 1989); *United States v. Richardson*, 764 F.2d 1514, 1527 (11th Cir. 1985); *United States v. McEachern*, 675 F.2d 618, 622 (4th Cir. 1982); *United States v. Passaro*, 624 F.2d 938, 943 (9th Cir. 1980); *United States v. Gay*, 623 F.2d 673, 675 (10th Cir. 1980); *United States v. Castro*, 596 F.2d 674, 677 (5th Cir. 1979).

101. See *United States v. Rodriguez*, 995 F.2d 776, 777 (7th Cir. 1993); *United States v. Holzman*, 871 F.2d 1496, 1504 (9th Cir. 1989); *United States v. Napolitano*, 552 F. Supp. 465, 483 (S.D.N.Y. 1982).

102. However, at least one state has statutorily narrowed *Robinson*’s holding, and a handful of state courts have interpreted their state constitutions to bar *Robinson*’s generalization. See MASS. ANN. LAWS ch. 276, § 1 (LexisNexis 2002) (“A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the *crime for which the arrest has been made* . . . .” (emphasis added)); *Commonwealth v. Pierre*, 893 N.E.2d 378, 381 n.4 (Mass. 2008) (recognizing that the statute was enacted in response to *Robinson*); see also *Jackson v. State*, 791 P.2d 1023, 1028 (Alaska Ct. App. 1990) (concluding on state constitutional grounds that during a search incident to an arrest for which no evidence could exist on the person, a search of “smaller containers which could only contain atypical weapons such as a razor blade, a small knife, a safety pin, or a needle must be supported by specific and articulable facts which would lead a reasonable person to believe that such an atypical weapon was in the small container”); *State v. Kaluna*, 520 P.2d 51, 59 (Haw. 1974) (holding that a search incident to arrest must be examined on a case-by-case basis and “limited in scope to a situation where it is reasonably necessary to discover the fruits or instrumentalities of the crime for which the defendant is arrested, or to protect the officer from attack, or to prevent the offender from escaping”); *State v. Neil*, 958 A.2d 1173, 1178 (Vt. 2008) (holding that a search of a closed container on an arrestee’s person is not lawful under the state constitution unless justified by exigencies tied to the particular case).

2. The Court Establishes a Somewhat More Searching Inquiry  
into Whether an Arrestee Could Reasonably Have  
Accessed the Searched Area

The lawfulness of a search conducted well after an arrest depends largely on the nature of the item searched.<sup>103</sup> A search of an arrestee's person—including effects “immediately associated” with the arrestee's person—may be lawfully conducted after the accused arrives at the place of detention, assuming that the search would have been lawful if conducted at the time of arrest.<sup>104</sup> However, a search of items not “immediately associated” with the arrestee's person may not be conducted after law enforcement officers have reduced the items to their “exclusive control.”<sup>105</sup>

The Court explained the reasoning for this dichotomy in *United States v. Chadwick*.<sup>106</sup> The Court concluded that, once police have brought an arrestee's items within their exclusive control, there is no longer a danger that the arrestee might gain access to the property to seize a weapon or destroy evidence.<sup>107</sup> In a search of the arrestee's person, the Court noted that the search is nonetheless justified by the reduced expectation of privacy an arrestee has in his person following an arrest.<sup>108</sup> However, a search of items not on the arrestee's person or immediately associated with his person at the time of arrest cannot be later justified by the reduced expectation of privacy the arrestee has in his person following an arrest.<sup>109</sup>

A search incident to arrest may also be unlawful if the arrestee could not have accessed the searched area to obtain a weapon or destroy evidence.<sup>110</sup> *Chimel* established that a search incident to arrest may only extend to the area within which an arrestee might be able to grab a weapon or destructible evidence.<sup>111</sup> However, following *Chimel*, it was not clear how closely a court must examine the facts of a particular case to determine whether the arrestee could have accessed the searched area.<sup>112</sup>

The Court has elaborated on this issue in a series of cases involving automobile searches. In *New York v. Belton*,<sup>113</sup> an officer arrested four occupants of a vehicle for drug offenses.<sup>114</sup> After the arrestees exited the car, the officer searched the passenger compartment and discovered cocaine

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103. Compare *United States v. Chadwick*, 433 U.S. 1, 14–16 (1977) (holding that a delayed search of a footlocker seized from an arrestee's trunk was unlawful), with *United States v. Edwards*, 415 U.S. 800, 801–02, 808–09 (1974) (upholding a delayed search of an arrestee's clothing).

104. See *Edwards*, 415 U.S. at 803.

105. *Chadwick*, 433 U.S. at 15.

106. 433 U.S. 1.

107. *Id.* at 15.

108. *Id.* at 16 n.10 (citing *Edwards*, 415 U.S. 800; *United States v. Robinson*, 414 U.S. 218 (1973)).

109. See *id.*

110. See *New York v. Belton*, 453 U.S. 454, 458 (1981).

111. See *Chimel v. California*, 395 U.S. 752, 760 (1969).

112. See *Belton*, 453 U.S. at 457–58.

113. *Id.* at 454.

114. *Id.* at 456.

in the pocket of a jacket in the car.<sup>115</sup> The Court upheld the search, holding that a vehicular search incident to arrest may extend to the full passenger compartment of a vehicle and any containers found therein.<sup>116</sup>

The Court reasoned that officers needed a clear standard to apply in the volatile setting of a vehicle arrest in order to carry out their duties efficiently, safely, and effectively.<sup>117</sup> Therefore, the Court embraced what it called a “generalization” that items within the passenger compartment of an automobile are within an arrestee’s reaching distance and therefore within his immediate control.<sup>118</sup>

The Court reexamined *Belton* in *Thornton v. United States*.<sup>119</sup> In *Thornton*, an officer arrested the defendant for a drug offense as the defendant was exiting his vehicle.<sup>120</sup> The officer placed the defendant under arrest, handcuffed him, put him in the back seat of the police car, and returned to the vehicle to search it, discovering a handgun under the driver’s seat.<sup>121</sup> The Court held that *Belton* authorized the search.<sup>122</sup>

Justice Scalia, joined by Justice Ginsburg, concurred in the judgment but argued that the search could not be justified by the *Chimel* rationales.<sup>123</sup> Justice Scalia reasoned that because the arrestee was secured and not within reaching distance of the vehicle at the time of the search, “[t]he risk that he would nevertheless grab a weapon or evidentiary ite[m] from his car was remote in the extreme.”<sup>124</sup>

However, Justice Scalia provided an alternative justification for the search.<sup>125</sup> He suggested that a *Belton* search could be justified “simply because the car might contain evidence relevant to the crime for which [the defendant] was arrested.”<sup>126</sup> He discussed how the Court had relied on this justification before *Chimel* and argued that those cases expressed a reasonable interpretation of what the Fourth Amendment requires.<sup>127</sup> Therefore, Justice Scalia proposed limiting *Belton* searches to instances where it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”<sup>128</sup>

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115. *Id.*

116. *Id.* at 460.

117. *Id.* at 458.

118. *Id.* at 460.

119. 541 U.S. 615 (2004).

120. *Id.* at 618.

121. *Id.*

122. *Id.* at 618–19.

123. *See id.* at 629 (Scalia, J., concurring).

124. *Id.* at 625 (second alteration in original) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

125. *Id.* at 629.

126. *Id.*

127. *Id.* at 629, 631 (citing *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950), *overruled by Chimel*, 395 U.S. 752; *Harris v. United States*, 331 U.S. 145, 151–52 (1947), *overruled by Chimel*, 395 U.S. 752; *Marron v. United States*, 275 U.S. 192, 199 (1927); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914)).

128. *Id.* at 632.

In *Arizona v. Gant*,<sup>129</sup> the Supreme Court again examined the justifications for a *Belton* search.<sup>130</sup> In *Gant*, the defendant was arrested for driving on a suspended license.<sup>131</sup> The officers handcuffed the defendant and locked him in their patrol car.<sup>132</sup> They then returned to the defendant's car, searched it, and found cocaine in the pocket of a jacket on the backseat.<sup>133</sup>

The Court held that the search was unlawful.<sup>134</sup> The Court established that a *Belton* search is only permitted if one of two conditions is satisfied. First, the vehicle may be searched if the arrestee is within reaching distance of the passenger compartment at the time of the search.<sup>135</sup> Second, due to "circumstances unique to the vehicle context," the vehicle may be searched "when it is 'reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.'"<sup>136</sup> The Court acknowledged that this rule did not follow from *Chimel* and was based only on the possibility of discovering evidence of the crime of arrest.<sup>137</sup>

The "reasonable to believe" standard from *Gant* is not a completely clear line.<sup>138</sup> In other search contexts, the phrase "reasonable to believe" is often interpreted as requiring "probable cause."<sup>139</sup> At least one court has attributed this meaning to *Gant*'s "reasonable to believe" language.<sup>140</sup> However, the *Gant* Court could not have intended this meaning "because otherwise *Gant*'s evidentiary rationale would merely duplicate the 'automobile exception,' which the Court specifically identified as a distinct exception to the warrant requirement."<sup>141</sup> Most courts have therefore interpreted the *Gant* standard as requiring only reasonable suspicion, a lesser degree of suspicion than probable cause.<sup>142</sup>

*Gant*'s authority outside the context of a vehicle search is also somewhat unclear. Some courts have applied *Gant*'s grab-area limitation to searches of nonvehicles.<sup>143</sup> However, one prominent commentator has suggested

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129. 556 U.S. 332 (2009).

130. *Id.* at 335.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 351.

136. *Id.* at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

137. *Id.*

138. See 3 LAFAVE, *supra* note 38, § 7.1(d), at 711 (noting that *Gant* "contains a variety of language suggesting an array of possibilities" regarding the level of suspicion necessary to conduct a search for evidence).

139. *Id.*; see also, e.g., *United States v. Pruitt*, 458 F.3d 477, 490 (6th Cir. 2006); *United States v. Gorman*, 314 F.3d 1105, 1111–12 & n.4 (9th Cir. 2002).

140. *United States v. Grote*, 629 F. Supp. 2d 1201, 1203 (E.D. Wash. 2009).

141. *United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010).

142. See, e.g., *id.*; *People v. McCarty*, 229 P.3d 1041, 1046 (Colo. 2010); *United States v. Taylor*, 49 A.3d 818, 823 (D.C. 2012).

143. See, e.g., *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010) ("[T]here is no plausible reason why [*Gant* should apply] only with respect to automobile searches, rather



that the Court's explicit limitation of *Gant*'s second prong to "circumstances unique to the vehicle context" suggests that it "appear[s] to have no application whatsoever" to searches outside the vehicle context.<sup>144</sup>

## II. APPLYING THE SEARCH INCIDENT TO ARREST EXCEPTION TO CELL PHONE SEARCHES

Part I examined the evolution of the search incident to arrest exception in the Supreme Court. This Part analyzes three approaches that have been taken to applying that doctrine to cell phone searches: a broad approach, a middle approach, and a narrow approach.

### A. *The Broad Approach: Searching Cell Phone Data Is Permitted Under the Exception*

This section explores a broad approach that holds that police may lawfully search cell phone data incident to an arrest without any cell phone-specific limitations.

#### 1. *People v. Diaz*

In *People v. Diaz*,<sup>145</sup> the California Supreme Court held that police may lawfully search the text message folder of a cell phone seized from an arrestee's person incident to an arrest.<sup>146</sup> Police arrested the defendant for drug-related offenses.<sup>147</sup> After transferring the defendant to a police station, the officers searched the phone and found a message connecting the defendant to drug trafficking.<sup>148</sup>

The defendant argued that cell phones should be subject to special search incident to arrest rules because they "contain [] quantities of personal data unrivaled by any conventional item of evidence . . . such as an article of clothing, a wallet, or a crumpled cigarette box found in an arrestee's pocket."<sup>149</sup> However, the court rejected this argument. The court reasoned that nothing in the Supreme Court's decisions suggested that authority to search an item "seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information."<sup>150</sup> Rather, the court held that *Robinson* authorized a full search of the arrestee's person without any additional justification.<sup>151</sup> In the court's view, this was confirmed by *Belton*, which

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than in any situation where the item searched is removed from the suspect's control between the time of the arrest and the time of the search.").

144. 3 LAFAVE, *supra* note 38, § 5.5(a), at 296.

145. 244 P.3d 501 (Cal. 2011).

146. *Id.* at 502.

147. *Id.*

148. *Id.* at 502–03.

149. *Id.* at 506 (first alteration in original).

150. *Id.* (emphasis omitted).

151. *Id.*

held there was no need to distinguish between containers found during a vehicle search, because “the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.”<sup>152</sup>

The court also noted that the defendant’s approach “would create difficult line-drawing problems.”<sup>153</sup> The court reasoned that it would be hard to draw a distinction between cell phones and other objects that might contain “highly personal, intimate and *private* information, such as photographs, letters, or diaries.”<sup>154</sup> And, even if some cell phones could be distinguished based on their storage capacity, the court failed to see why this would justify exempting all cell phones.<sup>155</sup> The court noted that distinguishing some phones from others based on their storage capacity would be impractical because officers would not be able to determine a particular phone’s capacity during an arrest.<sup>156</sup> Lastly, the court added that if “the wisdom of the high court’s decisions must be newly evaluated in light of modern technology, then that reevaluation must be undertaken by the high court itself.”<sup>157</sup>

## 2. *People v. Riley*

Finding *Diaz* controlling, the California Court of Appeals upheld a search of an arrestee’s smartphone following an arrest on gun charges in *People v. Riley*.<sup>158</sup> The search extended to photographs, videos, and a contact list stored on the defendant’s phone.<sup>159</sup> The defendant petitioned for certiorari, which the U.S. Supreme Court granted in January 2014 to review the lawfulness of the search.<sup>160</sup>

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152. *Id.* at 507 (emphasis omitted) (quoting *United States v. Belton*, 453 U.S. 454, 460–61 (1981)). In a footnote, the *Diaz* court recognized that *Arizona v. Gant*, 556 U.S. 332 (2009), limited *Belton*, but the court nonetheless held that *Gant* “reaffirmed *Belton*’s holding that whether a particular container may be searched does not depend on its character or the extent of the arrestee’s expectation of privacy in it.” *Diaz*, 244 P.3d at 507 n.9 (citing *Gant*, 556 U.S. at 345).

153. *Id.* at 508.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 511 (citations omitted) (internal quotation marks omitted).

158. No. D059840, 2013 WL 475242, at \*6 (Cal. Ct. App. Feb. 8, 2013), *cert. granted*, 134 S.Ct. 999 (2014).

159. *Id.* at \*3.

160. *Riley*, 134 S.Ct. 999. The question presented for review is “[w]hether evidence admitted at petitioner’s trial was obtained in a search of petitioner’s cell phone that violated petitioner’s Fourth Amendment rights.” *Id.*

### 3. *United States v. Finley*

In *United States v. Finley*,<sup>161</sup> the Fifth Circuit upheld a search of cell phone data, including text messages and call records, under facts similar to those in *Diaz*.<sup>162</sup> Police arrested the defendant for a narcotics offense and seized a cell phone from his person.<sup>163</sup> The officers transferred the defendant to another location and then searched the phone.<sup>164</sup>

The court reasoned that, under *Robinson*, police could search the phone for evidence in order to preserve it for later use at trial.<sup>165</sup> The court also relied on a Seventh Circuit case that held a search of a pager was lawful under *Robinson*.<sup>166</sup>

### 4. *United States v. Murphy*

The Fourth Circuit reached a similar holding in *United States v. Murphy*.<sup>167</sup> In *Murphy*, the defendant was arrested for obstruction of justice for providing a false identity during a vehicle stop.<sup>168</sup> A cell phone was subsequently discovered on the defendant's person and searched.<sup>169</sup>

The court held that the search was lawful, referencing the “‘manifest need . . . to preserve evidence’” recognized in its prior electronic search cases.<sup>170</sup> The defendant conceded that a phone with a small storage capacity could be searched without a warrant because its data was “‘volatile.’”<sup>171</sup> However, he argued that a cell phone with a larger storage capacity could not be searched without a warrant because its content would implicate a heightened privacy interest.<sup>172</sup>

The court rejected this argument, finding no meaningful way to quantify a “large” storage capacity as opposed to a “small” storage capacity.<sup>173</sup> The court also noted there was no reason to assume that information would be more “volatile” when stored on a phone with a smaller storage capacity.<sup>174</sup> Lastly, forcing police officers to determine a phone's storage capacity before searching it “would simply be an unworkable and unreasonable rule.”<sup>175</sup>

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161. 477 F.3d 250 (5th Cir. 2007).

162. *Id.* at 253–54.

163. *Id.* at 254.

164. *Id.*

165. *Id.* at 259–60.

166. *Id.* at 260 (citing *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996)).

167. 552 F.3d 405 (4th Cir. 2009).

168. *Id.* at 407–08.

169. *Id.* at 409.

170. *Id.* at 411–12 (alteration in original) (quoting *United States v. Young*, 278 F. App'x 242, 245–46 (4th Cir. 2008)).

171. *Id.* at 411.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

5. *United States v. Flores-Lopez*

In *United States v. Flores-Lopez*,<sup>176</sup> police arrested the defendant for drug-related offenses.<sup>177</sup> At the scene of the arrest, officers searched the defendant and seized a cell phone from his person. They then searched the phone to determine its number.<sup>178</sup> The Seventh Circuit held that the search was lawful but reserved the possibility that a more intrusive cell phone search might not be permissible.<sup>179</sup>

Judge Posner examined the potential justifications for a search of cell phone data incident to an arrest.<sup>180</sup> He concluded that a cell phone poses no danger once securely in the possession of an arresting officer, so an electronic search of cell phone data could not be justified by police officers' reasonable concerns for their safety.<sup>181</sup> However, he determined that a cell phone search could conceivably be justified by the government's interest in preserving evidence.<sup>182</sup> It is possible for a user who does not have physical access to a phone to remotely delete its data.<sup>183</sup> Judge Posner reasoned that this "remote-wiping" technology could theoretically be used by an arrestee's accomplice to destroy incriminating evidence.<sup>184</sup> The wiped data could be recoverable in a laboratory, but this process would create a delay.<sup>185</sup>

Ultimately, Judge Posner concluded that balancing the justifications for a search against its invasion of privacy interests is not necessary under *Robinson*.<sup>186</sup> Rather, a search incident to arrest is automatically permitted as long as it is no more invasive than, "say, a frisk, or the search of a conventional container."<sup>187</sup> Because a search to determine a cell phone's number does not exceed this level of invasiveness, the court concluded that such a search is lawful.<sup>188</sup> Judge Posner added that he could imagine justifications for a more extensive search but left that question "for another day."<sup>189</sup>

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176. 670 F.3d 803 (7th Cir. 2012).

177. *Id.* at 804.

178. *Id.*

179. *Id.* at 810.

180. *Id.* at 806–09.

181. *Id.* at 806.

182. *Id.* at 807–08.

183. *Id.* at 808.

184. *Id.*

185. *Id.*

186. *Id.* at 809–10.

187. *Id.* at 809.

188. *Id.* at 809–10.

189. *Id.* at 810.

*B. The Middle Approach: Searching Cell Phone Data Is Lawful Under the Exception Only If It Is Reasonable To Believe That Evidence Relevant to the Crime of Arrest Might Be Found on the Phone*

This section examines a middle approach that permits a warrantless search of cell phone data incident to arrest only when it is reasonable to believe evidence related to the crime of arrest might be found on the phone.

1. *United States v. Quintana*

In *United States v. Quintana*,<sup>190</sup> the court held that a cell phone search incident to defendant's arrest for driving on a suspended license was unlawful.<sup>191</sup> The court distinguished *Finley*, noting that in that case, "there was a reasonable probability that information stored on [the defendant's] device was evidence of [his] crime."<sup>192</sup> This was true because the defendant in *Finley* was arrested for drug-related activity, which is associated with cell phone use.<sup>193</sup> In contrast, the court noted that there was no reason to believe evidence relevant to the defendant's arrest for driving on a suspended license would be found on his cell phone.<sup>194</sup> Rather, the court concluded that the officer was merely rummaging for evidence of an unrelated offense.<sup>195</sup>

The court noted that, under *Robinson*, authority to search an arrestee's person incident to an arrest does not turn on the probability that weapons or evidence will be discovered.<sup>196</sup> However, the court nonetheless relied on Justice Scalia's concurring opinion in *Thornton* and comments during oral argument in *Gant* (which was still undecided at that time) for the idea that a search based on only an evidence-gathering rationale must be linked to some probability of discovering evidence related to the arrestee's initial offense.<sup>197</sup> The Court held that because the search could not have uncovered evidence related to the defendant's arrest for driving on a suspended license, the search "pushe[d] the search-incident-to-arrest doctrine beyond its limits."<sup>198</sup>

2. *United States v. McGhee*

In *United States v. McGhee*,<sup>199</sup> the court reached a similar conclusion.<sup>200</sup> In that case, the defendant was arrested for narcotics offenses that he allegedly committed ten months earlier.<sup>201</sup> A cell phone was taken from his

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190. 594 F. Supp. 2d 1291 (M.D. Fla. 2009).

191. *Id.* at 1301.

192. *Id.* at 1299.

193. *See id.*

194. *Id.* at 1300.

195. *Id.*

196. *Id.*

197. *Id.* at 1300–01.

198. *Id.* at 1300.

199. No. 8:09CR31, 2009 WL 2424104 (D. Neb. July 21, 2009).

200. *Id.* at \*1, \*3.

201. *Id.* at \*3.

person and searched.<sup>202</sup> The court held that the search was unlawful because it was not reasonable for the arresting officers to believe that the cell phone still contained evidence relevant to the offenses.<sup>203</sup>

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To date, the evidence-based approach has been employed only by two trial courts.<sup>204</sup> However, several commentators have argued that the approach should be widely adopted.<sup>205</sup>

First, these commentators contend that *Robinson* should not apply to cell phone searches. Professor Kerr argues that *Robinson* made sense in its day only because the search that the Court envisioned was necessarily narrow in scope.<sup>206</sup> At that time, a search of an individual's person might uncover "keys, a wallet, cigarettes, or a small amount of narcotics."<sup>207</sup> In contrast, searches of cell phones can uncover "the equivalent of many millions of pages of text."<sup>208</sup> Additionally, Professor Kerr argues that the *Chimel* rationales do not justify routine searches of cell phones.<sup>209</sup> "No one thinks that an electronic search through a cell phone might reveal a dangerous weapon," and in most cases the search also will not preserve evidence related to the crime of arrest.<sup>210</sup>

As a solution, Professor Kerr argues that cell phone searches should be permitted "only when justified by the evidence-preserving rationale justifying the exception."<sup>211</sup> He points to *Gant* as doctrinal support for this approach.<sup>212</sup> As discussed above, *Gant* established that a vehicle search incident to arrest is lawful if either of two conditions are met: first, if the arrestee is within reaching distance of the vehicle at the time of the search; and second, if it is reasonable to believe that evidence related to the crime of arrest might be found in the vehicle.<sup>213</sup>

Professor Kerr suggests that the first prong of *Gant* may be unnecessary for cell phone searches because a cell phone can easily be removed from an arrestee's reach.<sup>214</sup> However, he argues that the second prong should be

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202. *Id.*

203. *Id.*

204. *See id.*; *see also* United States v. Quintana, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009).

205. *See, e.g.,* Clifford S. Fishman, *Searching Cell Phones After Arrest: Exceptions to the Warrant and Probable Cause Requirements*, 65 RUTGERS L. REV. 995, 1039–40 (2013); Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 406–07 (2013); Ben E. Stewart, Note, *Cell Phone Searches Incident to Arrest: A New Standard Based on Arizona v. Gant*, 99 KY. L.J. 579, 598 (2011).

206. Kerr, *supra* note 205, at 404.

207. *Id.* at 404.

208. *Id.*

209. *Id.* at 405.

210. *Id.*

211. *Id.* at 407.

212. *Id.* at 406.

213. *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

214. Kerr, *supra* note 205, at 406.

applied to cell phone searches.<sup>215</sup> Under this approach, a cell phone could be lawfully searched pursuant to the exception “only when ‘it is reasonable to believe evidence relevant to the crime of arrest might be found’ in the device.”<sup>216</sup>

Commentators have suggested that this rule would substantially reduce the number of cell phone searches conducted incident to arrest because, for many crimes, any potential evidence in the arrestee’s cell phone will not be related to the reason for his arrest.<sup>217</sup> Professor Gershowitz argues that this would be the case for “traffic offenses, murder, rape, and robbery.”<sup>218</sup> Similarly, Professor Kerr notes that an individual arrested for drunk driving would probably not have evidence related to his offense on his cell phone.<sup>219</sup> On the other hand, he suggests that “[a] person charged with making a threat by telephone might have records of the threat on his phone.”<sup>220</sup>

However, even a proponent of this approach acknowledges it “will not provide a quick and easy solution.”<sup>221</sup> Indeed, it is far from clear whether a cell phone search would be automatically justified following, for example, a drug arrest.<sup>222</sup> In dictum, the *Quintana* court stated that such a search would be lawful.<sup>223</sup> Professor Gershowitz has agreed, reasoning that cell phones are recognized tools of the drug trade.<sup>224</sup> However, Professor Kerr has stated that a person arrested for possessing marijuana probably would not have evidence related to the offense stored on his phone.<sup>225</sup>

Under the evidence-based approach, the permissible scope of the search is also unclear.<sup>226</sup> Professor Gershowitz notes that even permissible searches would be limited in scope under this rule.<sup>227</sup> For example, he contends that it would make sense to search a phone’s text messages for evidence of a drug-related crime, because that function is commonly used in conjunction with drug sales.<sup>228</sup> However, photos and internet browsing history would be off-limits, he argues, because that information would likely have nothing to do with drug sales.<sup>229</sup>

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215. *Id.*

216. *Id.* at 406–07 (quoting *Gant*, 556 U.S. at 343).

217. *See id.* at 405–06; *see also* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 49 (2008).

218. *See* Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1145 (2011).

219. *See* Kerr, *supra* note 205, at 405.

220. *Id.*

221. Fishman, *supra* note 205, at 1039.

222. *See id.* at 1038–39.

223. *United States v. Quintana*, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009) (dictum).

224. Gershowitz, *supra* note 218, at 1146.

225. Kerr, *supra* note 205, at 405–06.

226. Fishman, *supra* note 205, at 1039.

227. Gershowitz, *supra* note 217, at 49.

228. *Id.*

229. *Id.*

*C. The Narrow Approach: Searching Cell Phone Data  
Is Not Permitted Under the Exception*

This section focuses on a narrow approach that prohibits searches of cell phone data under the exception.

1. *State v. Smith*

In *State v. Smith*,<sup>230</sup> the Ohio Supreme Court held that police may not search the contents of a cell phone pursuant to the search incident to arrest exception.<sup>231</sup> In *Smith*, police arrested the defendant in his home for narcotics distribution, searched him, and found a cell phone on his person.<sup>232</sup> After transporting the defendant to the police station, an officer searched the contents of the phone, including its call history.<sup>233</sup>

The court held that the search was unlawful.<sup>234</sup> The court reasoned that a cell phone is not analogous to a container; rather, objects falling under the definition of a “closed container” had traditionally been “physical objects capable of holding other physical objects.”<sup>235</sup> The court noted that this limitation was supported by the Supreme Court’s definition of a “container” as “any object capable of holding another object.”<sup>236</sup>

The court recognized that other courts had previously upheld searches of pagers and electronic memo books under the exception, but the court noted that these courts failed to consider the Supreme Court’s container definition.<sup>237</sup> Moreover, the court distinguished these searches from searches of cell phone data.<sup>238</sup> The court reasoned that even the least advanced cell phones today are capable of holding far more information than a pager or electronic organizer.<sup>239</sup> The court determined that this capability gives the users of cell phones “a reasonable and justifiable expectation of a higher level of privacy in the information they contain.”<sup>240</sup>

The court also noted that once a cell phone is in police custody, “the state has satisfied its immediate interest in collecting and preserving evidence and can take preventative steps to ensure that the data found on the phone are neither lost nor erased.”<sup>241</sup> Balancing the state’s limited interest against the arrestee’s heightened privacy interest, the court concluded that after

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230. 920 N.E.2d 949 (Ohio 2009).

231. *Id.* at 956.

232. *Id.* at 950.

233. *Id.*

234. *Id.*

235. *Id.* at 954.

236. *Id.* (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

237. *Id.* (citing *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996); *United States v. Chan*, 830 F. Supp. 531, 534 (N.D. Cal. 1993); *United States v. David*, 756 F. Supp. 1385, 1390 (D. Nev. 1991)).

238. *Id.*

239. *Id.*

240. *Id.* at 955.

241. *Id.*



seizing a cell phone incident to an arrest, “police must then obtain a warrant before intruding into the phone’s contents.”<sup>242</sup>

## 2. *Smallwood v. State*

The Supreme Court of Florida reached a similar holding in *Smallwood v. State*.<sup>243</sup> In that case, the arresting officer seized a cell phone from the defendant’s person during a search incident to an arrest for robbery.<sup>244</sup> The officer searched for data on the phone and discovered five digital images relevant to the suspected robbery.<sup>245</sup>

The court held that the warrantless search of the defendant’s cell phone was unlawful, reasoning that *Robinson* did not control its decision because “that case clearly did not involve the search of a modern electronic device and the extensive information and data held in a cell phone.”<sup>246</sup> Following *Robinson* would require analogizing a crumpled package of cigarettes to a modern cell phone, which, the court held, would be “like comparing a one-cell organism to a human being.”<sup>247</sup> The court discussed the “[v]ast amounts of private, personal information” stored in cell phones, “including not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter.”<sup>248</sup> In contrast, *Robinson* involved a “static, non-interactive container.”<sup>249</sup> Therefore, the court distinguished, in terms of both quantity and quality, the type of information stored on a cell phone compared with that contained in other items found on an arrestee’s person.<sup>250</sup>

The court also concluded that after the phone was removed from the defendant’s person, “there was no possibility that [the defendant] could use the device as a weapon, nor could he have destroyed any evidence that may have existed on the phone.”<sup>251</sup> Therefore, neither an officer-safety nor preservation-of-evidence rationale could justify the search, which therefore required a warrant.<sup>252</sup>

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242. *Id.* Although the court held the search was not justified under the search incident to arrest exception, it left open the possibility that such a search could be justified in circumstances involving an exigency. *Id.*

243. 113 So. 3d 724 (Fla. 2013).

244. *Id.* at 726–27.

245. *Id.* at 727–28.

246. *Id.* at 731, 740–41.

247. *Id.* at 732.

248. *Id.* at 731–32. The court also discussed the potential for a search of a cell phone to “evolve into a search of the interior of an arrestee’s home” through existing technology that integrates cell phones with home computer webcams. *Id.* at 732 (citing *United States v. Flores-Lopez*, 670 F.3d 803, 805–06 (7th Cir. 2012)).

249. *Id.*

250. *Id.* at 733 (“[E]ven justices on this Court routinely use cellular phones to access Court email accounts, and highly confidential communications are received daily on these electronic devices.”).

251. *Id.* at 735.

252. *Id.* (citing *Arizona v. Gant*, 556 U.S. 332, 335 (2009)). The court noted that *Gant* also held, “Circumstances unique to the vehicle context justify a search incident to a lawful

### 3. *United States v. Wurie*

In *United States v. Wurie*,<sup>253</sup> the First Circuit became the first federal circuit court to hold a cell phone search incident to arrest unlawful.<sup>254</sup> Officers arrested the defendant for distributing crack cocaine and took him to the police station, where they seized a cell phone from his person.<sup>255</sup> Several minutes later, officers at the station noticed the phone repeatedly ringing and observed that the incoming calls were identified as coming from “my house” on the external identification screen on the front of the phone.<sup>256</sup> They opened the phone to examine its call log and hit two buttons to identify the number associated with “my house.”<sup>257</sup>

The government argued that *Robinson* authorized a full search of the phone without any justification other than a lawful arrest.<sup>258</sup> However, the court rejected this as an overly formalistic view of *Robinson*.<sup>259</sup> The court conceded that “*Robinson* speaks broadly” and that the Supreme Court has never limited a search incident to arrest based on the type of item searched.<sup>260</sup> However, the court distinguished a cell phone search from other searches incident to an arrest because of the substantial volume and breadth of highly personal information stored on a cell phone.<sup>261</sup> Allowing a warrantless search of this “virtual warehouse” of private information would harken back to the general searches of the colonial era, which had inspired the Framers to adopt the Fourth Amendment.<sup>262</sup> Moreover, the *Robinson* Court could not have imagined that this level of intrusiveness would spring from its decision, because the Court “could not have envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence but a vast store of intangible data.”<sup>263</sup>

The court also held that cell phone searches as a category can never be justified by the *Chimel* rationales.<sup>264</sup> The court concluded that a cell

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arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Id.* at 735 n.6 (quoting *Gant*, 556 U.S. at 343). However, because the defendant’s arrest did not involve a vehicle, the court determined that justification did not apply. *See id.*

253. 728 F.3d 1 (1st Cir. 2013), *cert. granted*, 134 S.Ct. 999.

254. *Id.* at 13.

255. *Id.* at 2.

256. *Id.*

257. *Id.*

258. *Id.* at 7.

259. *Id.* at 7, 10.

260. *Id.* at 9.

261. *Id.* at 8 (discussing how a modern cell phone may store the equivalent of up to four million pages of text and noting that the information stored is “by and large, of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records”).

262. *Id.* at 9 (noting that such a highly intrusive search could occur even if an individual is arrested “for something as minor as a traffic violation”).

263. *Id.* at 12.

264. *Id.* at 10.

phone's data does not pose a threat to officer safety.<sup>265</sup> Moreover, a cell phone search cannot be justified by a need to preserve evidence, because police officers have at least three options available to prevent data in a seized phone from being lost or destroyed.<sup>266</sup> First, they can turn the phone off or take out its battery.<sup>267</sup> Second, they can place the phone in an inexpensive device that prevents data from being remotely deleted.<sup>268</sup> Third, they can copy the phone's contents to another device.<sup>269</sup>

Additionally, the court held that a bright-line rule was necessary for cell phone searches.<sup>270</sup>

A series of opinions allowing some cell phone data searches but not others, based on the nature and reasonableness of the intrusion, would create exactly the "inherently subjective and highly fact specific" set of rules that the Court has warned against and would be extremely difficult for officers in the field to apply.<sup>271</sup>

Therefore, even though the search of the defendant's cell phone was limited to his call log, the court found it necessary for all cell phone data searches to be governed by the same rule in order to protect against more invasive searches of text messages, emails, or photographs.<sup>272</sup> The court thus held that "the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person."<sup>273</sup>

### III. PLACING LIMITS ON SEARCHING CELL PHONE DATA INCIDENT TO A LAWFUL ARREST

The previous Part identified three approaches to applying the search incident to arrest exception to searches of cell phone data. This Part argues that courts should adopt the narrow approach and prohibit warrantless searches of cell phone data under the search incident to arrest exception. Part III.A explains that the broad approach is not required by *Robinson* and is not justified by a need to protect police officers or preserve evidence. Part III.B suggests that the middle approach would likely prove unworkable and would permit searches that are unreasonable because they are not necessary to preserve evidence related to an arrestee's crime. Part III.C argues that the narrow approach is the only solution that provides a workable framework for law enforcement and protects an individual's Fourth Amendment right to be free from unreasonable searches.

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265. *Id.*

266. *Id.* at 11.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 12–13 (quoting *Thornton v. United States*, 541 U.S. 615, 623 (2004)).

272. *Id.* at 13.

273. *Id.*

A. *The Broad Approach Is Not Required by Robinson and Is Not Justified by the Chimel Rationales*

The broad approach does not follow from the Supreme Court's holding in *Robinson*, because a modern cell phone shares few of the characteristics of a physical container.<sup>274</sup> A typical cell phone today stores far more information than an individual could carry on his person in a physical container.<sup>275</sup> Additionally, unlike physical containers, which will only occasionally contain personal information, a cell phone is very likely to contain some of a person's most private information, "including not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter."<sup>276</sup> Nearly forty years ago, the *Robinson* Court could not have envisioned that at least half of Americans would be regularly carrying a device capable of storing such a vast quantity of personal information.<sup>277</sup> Therefore, *Robinson* does not require permitting the search of a cell phone found on an arrestee's person incident to an arrest.

Additionally, the broad approach is not justified by the *Chimel* rationales. A cell phone does not pose a danger to police officers once removed from a defendant's possession.<sup>278</sup> Unlike pagers and early cell phones, even the most basic modern cell phones have significant storage capacities, which substantially reduces the chance that data will be automatically deleted from them.<sup>279</sup> It is also very unlikely that a phone's contents could be remotely destroyed. An arrestee would be unable to remotely delete data while detained, and presumably during that time, an arrestee's communication with outsiders would be monitored for illegal activity, including conspiring to destroy evidence. Even in the unlikely event that "remote wiping" proved to be a legitimate problem, police departments could prevent data from being destroyed by turning the phone off or placing it in an inexpensive device that prevents the phone from receiving an outside signal.<sup>280</sup> In short, unless the loss or destruction of data through remote wiping proves to be a problem, this concern does not warrant allowing police to search thousands or potentially millions of devices that store some of the public's most personal information.

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274. See *supra* notes 246–50 and accompanying text.

275. See *supra* notes 207–08 and accompanying text.

276. *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013).

277. See *supra* note 263 and accompanying text.

278. See *supra* note 181 and accompanying text.

279. See *supra* note 239 and accompanying text.

280. See *supra* notes 266–68 and accompanying text.

*B. The Middle Approach Is Self-Contradictory, Overstates the Evidence-Preservation Rationale, and Would Likely Prove Unworkable*

The middle approach is self-contradictory. On the one hand, advocates of the approach correctly point out that the incredible volume and breadth of personal information stored on a cell phone supports deviating from the *Robinson* rule.<sup>281</sup> However, on the other hand, they claim that in most arrest situations, it would be unreasonable to believe that evidence related to an arrestee's crime might be found somewhere in this vast store of data.<sup>282</sup>

In fact, in most arrest situations, it would likely be reasonable for an officer to believe that evidence related to an arrestee's crime *might* be found on his cell phone. Text messages are commonly offered as evidence in cases of murder,<sup>283</sup> robbery,<sup>284</sup> and rape.<sup>285</sup> When a defendant is arrested for a violent crime, it is also not uncommon for police to find incriminating photographs on the arrestee's phone.<sup>286</sup> Similarly, in a drug arrest, it would likely be reasonable to believe that an arrestee's contact list might contain evidence of drug associations.<sup>287</sup> A variety of other incriminating data, including emails and social media content could arguably be found on an arrestee's cell phone in other types of arrests. For example, someone arrested for driving on a suspended license might have a notice of the suspension in his email messages.<sup>288</sup> Even an individual arrested for driving under the influence might have recently used a social media application to post that he was at a bar.<sup>289</sup>

As cell phones continue to become more integrated into our lives, it will only become more reasonable to believe that evidence related to an arrestee's offense might be found in his cell phone. The storage capacity and number of applications on a typical cell phone has increased dramatically in recent years, and, as this continues, users will likely store more personal information on their phones.<sup>290</sup>

However, the mere possibility of discovering evidence related to an arrestee's offense is not sufficient to support a search under the Fourth

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281. See *supra* notes 206–08 and accompanying text.

282. See *supra* notes 217–19 and accompanying text.

283. See, e.g., *Gulley v. State*, No. CR 11–271, 2012 WL 4712207, at \*2 (Ark. Oct. 4, 2012); *State v. Elseman*, 841 N.W.2d 225, 229–30 (Neb. 2014).

284. See, e.g., *United States v. McCreary*, 308 F. App'x 39, 41 (9th Cir. 2008); *United States v. Hunter*, 266 F. App'x 619, 621–23 (9th Cir. 2008).

285. See e.g., *Long v. Commonwealth*, No. 2010-SC-000801-MR, 2011 WL 6826377, at \*1 (Ky. Dec. 22, 2011); *People v. Green*, 967 N.Y.S.2d 753, 755–56 (N.Y. App. Div. 2013).

286. See *Fishman*, *supra* note 205, at 1039.

287. See *supra* notes 223–24.

288. This would be relevant to demonstrate knowledge of the suspension, which is commonly an element of the offense. See, e.g., FLA. STAT. ANN. § 322.34(2) (West 2001 & Supp. 2013).

289. Cf. *United States v. Meregildo*, 883 F. Supp. 2d 523, 525–26 (S.D.N.Y. 2012) (considering the admission of evidence pulled from the defendant's Facebook profile); *Smith v. State*, 2012-KA-00218-COA, 2013 WL 2400393, at \*5 (Miss. Ct. App. June 4, 2013) (considering the admission of Facebook messages).

290. See *supra* note 35 and accompanying text.

Amendment.<sup>291</sup> Rather, the search incident to arrest exception is justified only by the two rationales articulated in *Chimel*.<sup>292</sup> As discussed in Part III.A, cell phone searches cannot be justified by these rationales, because cell phones do not pose a danger to police officers and the possibility of a cell phone's data being lost or destroyed after it is seized by police is extremely remote.

Some commentators have suggested that the middle approach could be justified as an adaptation or extension of *Gant*.<sup>293</sup> However, courts and commentators should be careful to not overstate the significance of *Gant* on cell phone searches. *Gant* is fundamentally about the proper scope of an arrestee's grab area in the context of a vehicle search.<sup>294</sup> This is not an issue when a cell phone is found on an arrestee's person. Moreover, the *Gant* Court explicitly limited its holding to vehicle searches.<sup>295</sup> Unlike a vehicle, which the Court has held is associated with a reduced expectation of privacy, a cell phone implicates a heightened expectation of privacy due to the volume of highly personal information it is capable of storing.<sup>296</sup> Therefore, even if *Gant* does have some precedential value outside the vehicle context, it would be unreasonable to extend *Gant* to justify cell phone searches.

Additionally, the middle approach would be difficult for police to apply and courts to evaluate, likely leading to inconsistent results. Courts have not clearly defined whether the reason-to-believe standard is equivalent to probable cause or reasonable suspicion.<sup>297</sup> Moreover, even in one of the most common arrest situations—a drug arrest—scholars do not agree that it would be reasonable to believe an arrestee's cell phone might contain evidence related to his offense.<sup>298</sup> An additional complication is that smartphone ownership is not consistent across different racial, socioeconomic, or age groups.<sup>299</sup> Therefore, it may be objectively more likely that incriminating data would be found on a phone seized from an arrestee in a young, affluent community than from an individual in an older, less wealthy area.<sup>300</sup>

Thus, the middle approach would encourage the type of post hoc decisionmaking that the Supreme Court has sought to avoid in its Fourth Amendment jurisprudence.<sup>301</sup> Nuanced rules may appeal to judges and lawyers, but they pose difficulties for officers in the field.<sup>302</sup> Subtle distinctions in the search incident to arrest context are particularly

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291. See *supra* notes 37–39 and accompanying text.

292. See *supra* notes 181, 239.

293. See *supra* note 205 and accompanying text.

294. See *supra* notes 135–36 and accompanying text.

295. See *supra* note 136 and accompanying text.

296. See *supra* notes 207–08 and accompanying text.

297. See *supra* notes 138–42.

298. See *supra* notes 222–25 and accompanying text.

299. See PEW RESEARCH CTR., *supra* note 33, at 4.

300. See *id.*

301. See *supra* note 271 and accompanying text.

302. See *supra* note 97 and accompanying text.

troublesome because a search incident to arrest is the most common form of law enforcement search, and police already have many factors to consider during the dangerous and complicated situation of an arrest.<sup>303</sup>

*C. The Narrow Approach Provides a Workable Framework and Protects Individuals from Unreasonable Searches of Their Cell Phone Content*

The narrow approach provides a workable framework that officers can easily apply in the field.<sup>304</sup> When a cell phone is found incident to an arrest, police should be permitted to seize the phone but required to obtain a warrant before examining its contents unless another established exception to the warrant requirement applies. Although the broad approach also provides a clear standard, only the narrow approach respects the principle that the search incident to arrest exception is truly an exception and can only be justified by significant law enforcement interests.<sup>305</sup> When a cell phone is seized incident to an arrest, there is no longer an exigency justifying an examination of its contents.<sup>306</sup> The government maintains a broader interest in gathering evidence related to the crime of arrest, but this interest is served through the warrant process articulated in the Fourth Amendment.<sup>307</sup> Therefore, allowing a warrantless, general evidence-gathering search of the highly personal information contained in a cell phone would permit an unjustified exception to the warrant requirement.

CONCLUSION

The cell phone search incident to arrest issue exemplifies the challenges of applying Fourth Amendment principles to modern technologies. Lower courts have split on whether *Robinson*'s forty-year-old holding extends to searches of cell phone data. In its upcoming decisions on this issue in *Wurie* and *Riley*, the Supreme Court should recognize that cell phone searches cannot be justified by the rationales for the search incident to arrest exception. The Court should therefore affirm the First Circuit's decision in *Wurie* and hold that when a cell phone is found on an arrestee's person incident to an arrest, police are required to obtain a warrant before examining its contents unless another established exception to the warrant requirement applies.

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303. See *supra* notes 94–95 and accompanying text.

304. See *supra* note 271 and accompanying text.

305. See *supra* note 39 and accompanying text.

306. See *supra* notes 181, 239.

307. See *supra* note 37 and accompanying text.